

ALASKA LEGISLATURE COMMITTEE FILES 2007-2008 SL&C 12636

purchase of premium wines and their interstate shipment that have been adopted by a number of States are, I believe, another example of abuse of the regulatory process to protect concentrated economic interests, going far beyond the minimum regulations needed to maintain the integrity of taxation and to protect minor consumers.¹⁹

Because all three bills permit direct shipping, all would increase competition and allow consumers to find lower prices. Of the three bills, Senate bill 1192 would increase competition the most by allowing out-of-state retailers, as well as wineries, to obtain out-of-state shipper's licenses. This additional competition likely would allow consumers to find even lower prices. The McLean study found that "the lowest online prices overwhelmingly come not from wineries, but from out-of-state retail outlets that have web-accessible inventories."²⁰

To provide New York consumers with the greatest benefits, the bills should ensure that licensing procedures for out-of-state vendors are not overly burdensome. For example, to ship into New York, Assembly bill 9560-A and Senate bill 6060-A require out-of-state wineries to obtain a "certificate of authority" and a "registration as a distributor" in addition to an out-of-state shipper's license. All three bills require out-of-state vendors to pay an annual fee of \$125. Such restrictions may constrain competition. Depending on the volume of purchases in a state, even seemingly small fees can deter smaller wineries from shipping wine.²¹ In addition, some states have created complex licensing procedures and regulations that deter suppliers and package delivery companies from shipping wine to those states. Furthermore, all three bills allow out-of-state vendors to obtain New York licenses only if those vendors are located in states that afford New York's vendors reciprocal treatment. This restriction will prevent some out-of-state vendors from shipping to New York residents, thereby somewhat limiting competition and consumer choice. To obtain the greatest benefits from competition, a policy should ensure that permit procedures, fees, and regulations are reasonably calculated to meet the state's legitimate regulatory goals.

III. States that Permit Interstate Direct Shipping of Wine Generally Report Few or No Problems with Direct Shipments to Minors

Although direct shipping can provide consumers with important benefits, policymakers have expressed concern that direct shipping might exacerbate the problem of underage drinking. As FTC staff recognized in the Wine Report and in other documents, underage alcohol use

¹⁹ See Daniel L. McFadden, Written Statement 1, at <http://www.ftc.gov/opp/e-commerce/anticompetitive/panel/mcfadden.pdf>.

²⁰ Wine Report at App. A 25 n.22.

²¹ See Wine Report at 41.

imposes significant costs, in both human and economic terms.²² In the context of the direct shipping of wine, however, the evidence shows that the states that permit interstate direct shipping generally report few or no problems with shipments to minors.

A. Evidence from States That Allow Direct Shipping

FTC staff contacted officials from many states that allow interstate direct shipping and asked them whether they had experienced problems with shipping to minors. These states generally report few, if any, problems with direct shipping to minors. Most of them do not believe that interstate direct shipment of wine to minors is currently a serious problem, although several of them believe that it is possible for minors to buy wine online. None of them report more than isolated instances of minors buying or even attempting to buy wine online.²³ State regulators uniformly expressed greater concern about underage access to alcohol through traditional avenues.

The state officials offered many possible explanations for their experiences. Several state officials opined that minors are more interested in beer and spirits than wine.²⁴ New Hampshire concluded that minors are less likely to purchase wine online because of the extra expense of ordering over the Internet.²⁵ This conclusion corresponds with the McLean study, which found that when transportation costs are included, lower-end wines are more expensive when purchased over the Internet than through the three-tier system.²⁶ Minors would have to pay a hefty premium, from 33-83%, to purchase a bottle of wine costing less than \$20 online and have it delivered to them via 2nd Day Air. Similarly, several state officials also commented that, based on their experience, minors were much more likely to buy alcohol through offline sources than over the Internet.²⁷ In a 2002 survey, large percentages of high school students, from 68-95%, said that it is "fairly easy" or "very easy" to get alcohol.²⁸

²² See *id.* at 26-38; FTC, *Self-Regulation in the Alcohol Industry: A Review of Industry Efforts to Avoid Promoting Alcohol to Underage Consumers* App. A, pp. iii-iv (Sept. 1999), at <http://www.ftc.gov/reports/alcohol/alcoholreport.htm>.

²³ See Wine Report at 26-40.

²⁴ See *id.* at 32 (chart summarizing state responses), App. B (letters from state officials). See also Wall Street Journal, Editorial, *The Carafe is Half Full*, WALL ST. J., July 3, 2003, at A10 (arguing that teenagers are not interested in expensive wines, and that "[t]hirty states allow wine shipments within their borders without a surge in teen drinking").

²⁵ *Id.* at App. B (New Hampshire letter).

²⁶ See *id.* at App. A.

²⁷ See *id.* at App. B (California testimony; letters from New Hampshire and Wisconsin).

²⁸ See *id.* at notes 47-50 and accompanying text.

Of course, the fact that states have received few complaints about direct shipments to minors does not establish that minors are not purchasing wine online. As noted by a Michigan Assistant Attorney General, minors who buy wine online are unlikely to report their purchases to the authorities, and neither the package delivery company nor the supplier may know or care that they are delivering wine to a minor.²⁹ FTC staff cannot rule out the possibility that minors are buying wine online undetected by state officials.

Nevertheless, the staff is aware of no systematic studies assessing whether direct shipping increases alcohol consumption by minors. FTC staff found only one study that might address the impact of direct shipping of wine on underage drinking. This study examines the impact of "home delivery" of keg beer and other alcohol on underage drinking from such traditional retailers such as local liquor stores.³⁰ Although the study raises important issues of concern, it provides little information upon which to assess interstate direct shipping of wine. The study does not specifically address online sales, interstate direct shipment via package delivery companies, or wine. For example, one of the study's key findings is that "[o]utlets providing delivery services were more likely to sell keg beer." Moreover, the study itself states that "data presented here do not reveal the frequency of delivery use or whether delivery purchases served as a primary source of alcohol," and the study does not assess whether home delivery or direct shipping increases underage alcohol consumption above the level that would occur without those channels.³¹

The data from state compliance checks, or stings, in theory could provide additional evidence on the impact of interstate direct shipping on underage drinking. Several states have conducted stings on interstate direct shipments of wine. Typically in these stings, states provide a minor with a credit card to see whether the minor can purchase wine online, and whether the supplier or package delivery company will refuse to deliver it to the minor. These data, however, are also inconclusive. Stings and anecdotes have shown that minors are able to buy wine online, but there are not enough data from which to conclude that minors can buy wine more or less easily online than offline. For instance, Michigan found that "[a]bout one in three websites contacted" (roughly 33%) agreed to sell alcohol to the minor with no more age verification than a mouse click, and that UPS delivery people did not properly verify the recipients' ages.³² On the other hand, New Hampshire has run compliance checks in the past but

²⁹ See Testimony of Irene Mead 196, at <http://www.ftc.gov/opp/ecommerce/anticompetitive/021008antitrans.pdf>.

³⁰ Linda A. Fletcher et al., *Alcohol Home Delivery Services: A Source of Alcohol for Underage Drinkers*, J. STUD. ALCOHOL 61: 81-84 (2000).

³¹ The National Academy of Sciences cites this study, and only this study, for the proposition that "[s]urveys of underage purchase of alcohol over the Internet or through home delivery show that small percentages (10 percent) of young people report obtaining alcohol in this manner." See *Reducing Underage Drinking: A Collective Responsibility* 174-75 (2004). As noted in the text, however, the cited study does not discuss the Internet or sales from out-of-state vendors.

³² See Wine Report at 35.

did not report any problems with interstate direct shipping to minors.³³ Moreover, the bricks-and-mortar sting data show comparable results. These stings typically find that minors are able to buy alcohol between 15-30% of the time. In Michigan, minors were able to buy alcohol 55% of the time after showing a valid Michigan license that identified the customer as a minor.³⁴ Ultimately, there are little data indicating whether a retail clerk is a more or less reliable gatekeeper than a common carrier's delivery person. Of course, efforts should be made to minimize underage purchases of alcohol, both online and offline, and New York's bills incorporate safeguards against direct shipping to minors.

B. Less Restrictive Regulatory Tools

Many states have decided that they can prevent direct shipping to minors through non-discriminatory, less restrictive means than a complete ban. For example, some states have applied the same types of safeguards to direct shipments that already apply to bricks-and-mortar retailers, such as requirements that package delivery companies obtain an adult signature at the time of delivery. In addition, several states, including Nebraska, New Hampshire, and Wyoming, require out-of-state suppliers to register and obtain permits (a permit can be conditioned on the out-of-state supplier's consent to submit to the state's jurisdiction). None of these states reported any problems with interstate direct shipping to minors.³⁵

New York's bills contain these types of safeguards. In sending the wine, the shipper must ensure that the delivery package has a conspicuous label, and the common carrier must obtain an adult signature at the time of delivery. In addition, the shipper must register with the state and consent to jurisdiction within New York for enforcement purposes. Finally, the bills give the state liquor authority the power to suspend or revoke an out-of-state shipper's license. Notably, New York's bills contain all of the safeguards recommended by both the National Academy of Sciences, which recommended "tightening access" rather than banning interstate direct shipping, and FTC staff.³⁶

To the extent that minors do buy wine online, some argue that they lack adequate enforcement tools against out-of-state suppliers. They contend that the states cannot readily inspect the records of out-of-state suppliers, and that because of jurisdictional constraints, "there is no easy way to shut [out-of-state suppliers] down if violations occur." They also argue that out-of-state suppliers have little incentive to prevent sales to minors, in part because of enforcement difficulties, but also because individual states can only punish out-of-state suppliers with the loss of a small part of their market, not the loss of a license. They note that, in contrast,

³³ See *id.* at App. B (New Hampshire letter).

³⁴ See *id.* (noting a success rate of 30% in bricks-and-mortar stings); Letter from Tina Schultz, National Alcohol Beverage Control Association, to FTC 2-4 (Jan. 31, 2002) (citing state statistics).

³⁵ See Wine Report at App. B (letters from Nebraska, New Hampshire, and Wyoming).

³⁶ See Wine Report; NAS, Reducing Underage Drinking: A Collective Responsibility 174-75 (2004).

they can readily inspect in-state wholesalers and retailers on-site, run compliance checks, and punish violators with the loss of a license, fines, and other penalties.³⁷

States, however, have a variety of legal remedies against out-of-state suppliers that ship to minors. The Twenty-First Amendment Enforcement Act gives state attorneys general the power to bring civil actions in federal court for injunctive relief against out-of-state suppliers that violate the state's liquor laws.³⁸ At the time the law took effect, in 2000, state authorities agreed that the Act would help them enforce their laws against out-of-state suppliers. The National Alcohol Beverage Control Association ("NABCA"), an association of state regulators, stated that the Act would "provide state governments with an effective tool to use in preventing the illegal interstate flow of alcohol beverages, some of which finds its way into the hands of underage drinkers."³⁹ NABCA also said that the Act would help states "overcome the jurisdictional hurdles" in enforcing their laws.⁴⁰ Finally, TTB, which has authority to revoke a winery's basic permit, will assist states in combating significant violations of state law.⁴¹

States also can request assistance from other states' alcohol agencies. New Hampshire will punish suppliers licensed in New Hampshire if another state proves that the supplier is shipping wine illegally into that state.⁴² Likewise, when officials in Louisiana learn of a violation, they have a duty to notify both TTB and the state that licensed the violator, and to "request those agencies to take appropriate action."⁴³

Overall, the evidence shows a few clear results. States that permit interstate direct shipping have adopted various procedural safeguards and enforcement mechanisms to prevent sales to minors. These states generally say that direct shipping to minors currently is not a serious problem, and that they have received few or no complaints about direct shipping to minors. The McLean study suggests that an interstate shipping ban primarily deprives consumers of access to lower-cost sources of high-end, expensive wines, and to a larger variety

³⁷ See Wine Report at 29-30.

³⁸ 27 U.S.C. § 122a (2002); Letter from Sheryl L. Walter, Acting Assistant Attorney General, U.S. Department of Justice, to Hon. Dennis Hastert, Speaker, U.S. House of Representatives 2 (May 3, 2001); *Bolick v. Roberts*, 199 F.Supp.2d 397, 442 (E.D. Va. 2002) (addendum), *variated on other grounds*, *Bolick v. Danielson*, 330 F.3d 274 (4th Cir. 2003).

³⁹ Letter from James M. Goldberg, counsel for NABCA, to Jonathan Rusch, Special Counsel for Fraud Prevention, U.S. Department of Justice 2 (Mar. 19, 2001), attached as an enclosure to the Walter letter.

⁴⁰ *Id.* See also Wine Report at App. B (noting that Illinois could use the Act).

⁴¹ ATF, Industry Circular No. 96-3, Direct Shipment Sales of Alcohol Beverages (Feb. 11, 1997), at http://www.atf.treas.gov/pub/ind_circulars/ic_96-3.htm.

⁴² N.H. REV. STAT. ANN. § 178:14-a(VIII) (2000).

⁴³ LA. REV. STAT. ANN. § 26:359(G) (West 2001).

of all wines. FTC staff has seen no evidence indicating whether higher prices for these types of fine wines would curtail consumption significantly either among the general populace, minors, or problem drinkers. There is, therefore, apparently no empirical evidence that bans on interstate direct shipping promote temperance. Because New York's bills contain the same types of recommended safeguards as those adopted by states that allow interstate direct shipping and report few problems, it is likely that New York will experience few, if any, problems with direct shipments of wine to minors.

IV. States that Permit Interstate Direct Shipping of Wine Generally Report Few or No Problems with Tax Collection

Some states also have adopted less restrictive means of protecting tax revenues while permitting direct shipping, such as by requiring out-of-state suppliers to obtain permits and to collect and remit taxes.⁴⁴ New York's bills incorporate these types of requirements. Of these states, most report few, if any, problems with tax collection. Nebraska, for example, reports that they "have also not, as yet, had any problems with the collection of excise tax[es]."⁴⁵ North Dakota reports that "Taxes are collected. No problems to date that we are aware of."⁴⁶

To the extent that states have problems with out-of-state suppliers, they have addressed the problem in less restrictive ways than banning all interstate direct shipping. New Hampshire, for example, works with out-of-state suppliers:

[T]he State of New Hampshire Liquor Commission collects an 8% fee on all shipments into the State of New Hampshire. When the NH Liquor Commission discovers an improper shipment we contact the company and inform them of the laws in NH. Once the company learns of NH laws they normally get a permit or stop shipping into NH. The NH Liquor Commission is working with out-of-state supplier[s] and encouraging them to obtain a permit.⁴⁷

Furthermore, to the extent that out-of-state suppliers fail to comply voluntarily, states can report problems to TTB or other states, or use the Twenty-First Amendment Enforcement Act. On the other hand, there is no evidence showing that states must ban interstate direct shipping, rather than adopting a less restrictive alternative, to raise revenue.

Finally, regardless of whether states permit or prohibit interstate direct shipping, there is no reason to believe that legalized direct shipping would increase tax evasion. It is unlikely that

⁴⁴ See, e.g., LA. REV. STAT. ANN. § 26:359(B)(1); N.H. REV. STAT. ANN. § 178:14-a(V); NEV. REV. STAT. § 369.462.

⁴⁵ See Wine Report at App. B (Nebraska letter).

⁴⁶ See *id.* (North Dakota letter).

⁴⁷ See *id.* (New Hampshire letter).

states would increase illegal interstate direct shipping by creating procedures that would allow out-of-state suppliers to ship legally and pay taxes. Michigan, for example, reports that many out-of-state suppliers ship wine illegally into Michigan, and that those suppliers do not pay taxes to Michigan. Michigan, however, already prohibits out-of-state suppliers from shipping wine into Michigan, and out-of-state suppliers that ship into Michigan are already breaking the law. By legalizing direct shipping and requiring shippers to pay taxes as a condition for receiving a license, states could allow interstate direct shipping from out-of-state suppliers that comply with the law. If suppliers who currently ship illegally continue to ship illegally, then the level of tax evasion would remain unchanged, but if some suppliers who currently ship illegally decide to ship legally, then tax evasion would fall. Moreover, if interstate direct shipping increases overall commerce in wine, overall tax revenue could rise.⁴⁸

V. The Bills Would Promote E-Commerce and Interstate Commerce

The Internet lets consumers purchase an unprecedented array of goods and services from the convenience of their homes. Consumers can find thousands of goods, from thousands of suppliers around the country, and have those goods delivered to their doors. State bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine. In states that ban interstate direct shipping, the bans prevent consumers from conveniently purchasing wine from suppliers around the country.⁴⁹

The direct shipping issue has broader implications for interstate e-commerce. In many industries, including many professional and financial services, states require that potential suppliers maintain a physical office within the state, or that they hire state residents.⁵⁰ Under current New York law, for example, out-of-state wineries can obtain a license to distribute and sell alcohol in New York only if they "comply with the licensing requirements of [New York] Law, including establishing and maintaining a physical presence in New York."⁵¹ These requirements ostensibly allow states to maintain tighter regulatory control over the supplier, but they also significantly raise the cost to online suppliers to doing business within a particular state. They deprive online suppliers of one of the main efficiency benefits of e-commerce, the ability to provide goods and services over large distances without the need for a substantial, far-flung physical presence. They also demonstrate how seemingly neutral restrictions can deprive online firms of a legitimate competitive advantage. State physical presence laws apply equally

⁴⁸ See *id.* at 39-40.

⁴⁹ See, e.g., Virginia Postrel, *A Look at Wine Sales over the Internet Shows the Price of Some Regulations in the Name of Consumer Protection*, N.Y. TIMES, July 17, 2003, at C2 (criticizing bans on interstate direct shipping as a barrier to e-commerce).

⁵⁰ At the workshop, FTC staff examined potentially anticompetitive barriers to e-commerce in many other industries: auctions; automobiles; caskets; contact lenses; cyber schools; online legal services; real estate, mortgages, and financial services; retailing; and telemedicine and online pharmaceutical sales. See Workshop Homepage, at <http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>.

⁵¹ *Swedenburg v. Kelly*, 358 F.3d 223, 228-29 (2d Cir. 2004).

to in-state and out-of-state firms. In reality, though, these requirements impose disproportionate costs on online firms by diminishing or eliminating one of their advantages. Moreover, online firms, unlike bricks-and-mortar firms, may not enjoy the full financial benefits of maintaining an in-state office, because only part of their client base will reside in any particular state.

On the other hand, there is little evidence that in-state office requirements are necessary to advance consumer protection goals. For instance, there is little evidence that in-state office requirements reduce the incidence of consumer fraud by "fly-by-night" operators who deceive consumers and then disappear. FTC staff have ample experience demonstrating that deceptive lending can harm consumers, particularly for low-income and unsophisticated borrowers.⁵² There is, however, no necessary correlation between a lender's propensity to deceive consumers and the presence or absence of in-state offices or personnel. In a number of the most significant deceptive lending cases brought by the Commission, the lenders operated in-state offices.⁵³

Physical presence is not necessary to ensure accountability.⁵⁴ Nor is the issue of enforcement unique to wine. As with catalogue sales or online sales of other products, a variety of general laws and regulations protect consumers and provide legal remedies. Consumers can use general contract and tort law, as well as other specific state consumer protection laws and federal laws, to seek legal redress against out-of-state suppliers. State enforcement agencies can use a variety of legal tools, such as the Twenty-First Amendment Enforcement Act and cooperation with other states' enforcement agencies. Moreover, federal agencies, including the FTC, TTB, and Department of Justice, have authority to bring enforcement actions against sellers who violate the law. At best, physical presence requirements are an expensive, inefficient means of getting an incremental increase in regulatory authority. At worst, if extended to other industries, physical presence requirements could seriously imperil the growth of e-commerce.

Finally, your letter asked us to comment on arguments regarding "harm to the three-tier system." The FTC's statutory mandate, of course, is to promote competition and consumer welfare, not producer welfare. Having said that, the evidence suggests that expanded e-commerce would improve market conditions by giving wineries (including New York wineries), the first tier of the system, extra distribution outlets. Moreover, expanded e-commerce likely would not spell the end of bricks-and-mortar wholesalers or retailers. Because of shipping costs, consumers generally can find lower prices for less expensive wines in bricks-and-mortar stores.

⁵² See Prepared Statement of the Federal Trade Commission on Efforts to Combat Unfair and Deceptive Subprime Lending, before the Senate Special Committee on Aging 4-8, February 24, 2004, at <http://www.ftc.gov/os/2004/02/02242004subprimelendingtest.pdf>.

⁵³ See, e.g., *The Associates*, No. 1:01-CV-00606 (N.D. Ga. 2001); *Firat Alliance Mortgage Co., et al.*, No. SACV 00-964 DOC (*Eex*) (C.D. Cal. 2000); *Mercantile Mortgage Co.*, No. 02-5079 (N.D. Ill. 2002).

⁵⁴ Cf. *Swedenburg*, 358 F.3d at 237-38.

In states that permit interstate direct shipping, such as California and Illinois, wholesalers and retailers continue to enjoy the bulk of sales.⁵⁵

Conclusion

Based on an extensive review of the evidence, FTC staff believes that, if enacted, any of the bills would enhance consumer welfare and would allow New York to meet its other public policy goals. FTC staff also believes that Senate bill 1192 would provide greater benefits to consumers than Assembly bill 9560-A or Senate bill 6060-A, because that bill would allow both out-of-state wineries and retailers to obtain out-of-state shipper's licenses.

Respectfully submitted,

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⁵⁵ See Daniel L. McFadden, Written Statement 2, at <http://www.ftc.gov/opp/ecommerce/anticompetitive/panel/mcfadden.pdf> ("If direct interstate wine shipments were reopened, I would foresee some competitive pressure on distributors and retailers, primarily from direct wine sales to large retailers, but no substantial restructuring of the industry. I find it particularly sad that the anti-interstate shipping legislation that has been passed is so disproportionate in its negative impact on consumers relative to the very modest protection it provides to traditional distributors and retailers").



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For Your Information: March 30, 2004

Related Documents:

FTC Staff: New York Direct Shipment of Wine Bills Would Promote E-commerce and Consumer Welfare

Bills Remove a Significant Barrier to Greater E-Commerce

In response to requests from three New York state legislators, the staffs of the Federal Trade Commission's Office of Policy Planning, Northeast Regional Office, and Bureaus of Competition, Consumer Protection, and Economics have provided comments regarding three bills that would allow out-of-state vendors to ship wine directly to New York consumers if the vendors comply with certain regulatory requirements. According to the staff comments, the bills would promote e-commerce and give New York residents access to a greater variety of wines at lower prices, while allowing the state to satisfy its other public policy goals.

Todd Zywicki, Director of the FTC's Office of Policy Planning, stressed that the bills would help consumers. "Based on our empirical research, the bills could allow consumers to save significantly on more expensive wines. The bills would also give consumers access to thousands of wines from around the country," he said. Asheesh Agarwal, Assistant Director of the Office of Policy Planning, added that the bills would promote e-commerce. "By eliminating the requirement that out-of-state sellers maintain a physical presence in New York, the direct shipping bills would eliminate the single largest regulatory barrier to expanded e-commerce in the wine industry," he said.

The comments, available on the Commission's Web site, were sent to William Magee, Chairman of the State Assembly Agriculture Committee; John R. Kuhl, Jr., Chairman of the State Senate Committee on Transportation; and Dean G. Skelos, Deputy Majority Leader of the State Senate. The comments analyze three New York bills, Assembly bill 9560-A, Senate bills 6060-A and 1192.

The staff comments first summarize the FTC's experience studying the direct shipment of wine to consumers, including a comprehensive report issued last July and congressional testimony delivered last October. The comments then analyze the pending bills, describing the regulatory requirements on shippers and common carriers. The comments conclude that the bills would allow consumers to purchase a greater variety of wines at lower prices.

The comments then summarize the experiences of states that currently allow interstate direct shipping of wine. The comments note that these states generally report few if any problems with direct shipments to minors, or with collecting taxes from those shipments. The comments also note that the bills contain all of the safeguards recommended by both the National Academy of Sciences and FTC staff, such as requiring an adult signature at the point of delivery. Finally, the comments discuss the implications of physical presence requirements for e-commerce generally, stating that "if extended to other industries, physical presence requirements could seriously imperil the growth of e-commerce."

In concluding its comments, the FTC staff said, "Based on an extensive review of the evidence, FTC staff believes that, if enacted, any of the bills would enhance consumer welfare and would allow New York to meet its other public policy goals."

The Commission vote authorizing staff to file the comments was 5-0. The comments represent the views of the staff of the FTC's Office of Policy and Planning, Bureaus of Competition, Consumer Protection, and Economics, and Northeast Regional Office, and not necessarily those of the Commission or any individual Commissioner.

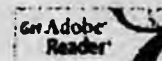
Copies of the document mentioned in this release are available from the FTC's Web site at <http://www.ftc.gov> and also from the FTC's Consumer Response Center, Room 130, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580. Call toll-free: 1-877-FTC-HELP.

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Comments of the Staff of the Federal Trade Commission Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, Bureau of Economics, and Northeast Regional Office (March 2004) to the Chairman, Assembly Agriculture Committee, Chairman, Senate Committee on Transportation and Deputy Majority Leader, New York Senate, Concerning New York Assembly bill 9560-A, and Senate bills 6060-A and 1192. (V040012)

- Text of the Staff Comments [PDF 67KB]



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(FTC File No. V040012)

(<http://www.ftc.gov/opa/2004/03/nywine.htm>)

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May 16, 2005

Supreme Court Strikes Down Bans on Wine Shipments
By DAVID STOUT

WASHINGTON, May 16 - The Supreme Court ruled today, in a case of interest to millions of wine-drinkers and those who make a living in the multibillion-dollar industry, that people can buy wine directly from out-of-state vineyards.

In a 5-to-4 decision that struck down laws in New York and Michigan, and by extension calls into question the laws in 22 other states, the court held that laws that discriminate against out-of-state vineyards violate the Constitution's Commerce Clause, which empowers Congress to regulate interstate commerce.

"Laws such as those at issue contradict the principles underlying this rule by depriving citizens of their right to have access to other states' markets on equal terms," the majority held, in an opinion by Justice Anthony M. Kennedy.

Today's ruling does not leave state lawmakers powerless to regulate direct shipments of alcohol, but if they do so they must not favor their own states over other states. Indeed, Nida Samona, the chairwoman of the Michigan Liquor Control Commission, told The Associated Press that her commission would urge lawmakers to bar direct shipments for both local and out-of-state wineries.

Today's ruling is of intense interest not only to the states - 26 of which already allow direct shipment from out-of-state wineries - but also to the wholesale liquor industry, which fears eventually being left out of what is now a state-run three-tier system: liquor producer to licensed wholesaler to licensed retailer.

The worry for liquor wholesalers has been that if the justices ruled that consumers could buy wine directly from out-of-state producers, so might liquor retailers be able to do so, at least in theory.

Today's decision, in the cases of *Granholm v. Heald*, No. 03-1116, from Michigan, and *Swedenburg v. Kelly*, No. 03-1274 from New York, had to do with interpretation of the Constitution, the intent of the 1933 Amendment that ended Prohibition and changing personal tastes in the age of the Internet.

When the case was argued before the justices on Dec. 7, lawyers for New York and Michigan asserted that the Prohibition-ending 21st Amendment to the Constitution gave states such wide authority over the importation of alcohol that it trumped the principle embodied in the Commerce Clause: that the states may not, without Congressional authorization, discriminate against one another.

New York's and Michigan's lawyers insisted then that the goals of preventing minors' access to alcohol and assuring that the states could collect taxes from out-of-state shippers justified their states' statutes. Solicitor General Caitlin J. Halligan of New York told the justices that the case "goes to the very core of the 21st Amendment."

Justice Kennedy responded - tellingly, it would appear from today's ruling - that "it also goes to the very core of the Commerce Clause."

Justice Kennedy wrote today that the real object of the Michigan and New York statutes was not protection of minors but rather to give in-state wineries a competitive advantage over those in other states. Justice Kennedy, who was joined by Justices Antonin Scalia, David H. Souter, Ruth Bader Ginsburg and Stephen G. Breyer, said New York and Michigan "provide little evidence for their claim that purchasing wine over the Internet by minors is a problem."

"The 26 states now permitting direct shipments report no such problem, and the states can minimize any risk with less restrictive steps, such as requiring an adult signature on delivery," the majority said. Moreover, the majority said, the states could devise tax-collection procedures without resorting to discrimination in interstate commerce.

"In all but the narrowest circumstances" the states violate the Commerce Clause if they erect barriers to help in-state business at the expense of outsiders, the majority said in describing the Commerce Clause as "essential to the foundations of the Union."

The majority observed that "the current patchwork of laws - with some states banning direct shipments altogether, others doing so only for out-of-state wines, and still others requiring reciprocity - is essentially the product of an ongoing, low-level trade war."

Chief Justice William H. Rehnquist and Justices John Paul Stevens, Sandra Day O'Connor and Clarence Thomas dissented.

Justice Stevens conceded that the New York and Michigan laws would be "patently invalid" if they regulated sales of "an ordinary article of commerce," not wine. "But ever since the adoption of the 18th Amendment and the 21st Amendment, our Constitution has placed commerce in alcoholic beverages in a special category," Justice Stevens wrote. (The 18th Amendment ushered in the era of Prohibition and, some social historians have said, the bootleggers and speak-easies that accompanied it.)

"Today, many Americans, particularly those members of the younger generations who make policy decisions, regard alcohol as an ordinary article of commerce, subject to the same market and legal controls as other consumer products," Justice Stevens wrote. "That was definitely not the view of the generations that made policy in 1919 when the 18th Amendment was ratified or in 1933 when it was repealed by the 21st Amendment."

That alcoholic beverages are something apart in the world of commerce is obvious from what happened after Prohibition ended, Justice Stevens went on: "So-called 'dry states' entirely prohibited such commerce; others prohibited the sale of alcohol on Sundays; others permitted the sale of beer and

wine but not hard liquor; most created either state monopolies or distribution systems that gave discriminatory preferences to local retailers and distributors."

Small local wineries were elated by today's ruling. "This is the best day for wine lovers since the invention of the corkscrew," Clint Bolick, counsel for the Institute for Justice, which represented local wineries, told The Associated Press. "It demonstrates that in the era of the Internet the court will vindicate the principles of free trade that made this country great."

And Juanita Swedenburg, the Middleburg, Va., vintner who sued to overturn the New York law, told The A.P. that the ruling was "a boon for America's wine-loving consumers who like to have various wines from throughout the nation."

The laws overturned today are not identical. Michigan's statute flatly prohibited direct shipments by out-of-state wineries. New York's permitted such shipments in theory - as long as the winery maintained a physical presence in New York, including a warehouse to store wines before sale. No out-of-state winery has qualified for this exception in the 35 years that the law has been on the books.

Among the other states that ban direct shipments from out-of-state wineries are Connecticut, Delaware, Pennsylvania, New Jersey, Vermont, Massachusetts and Florida. A few states even make importing a felony. (A map showing the wine laws throughout the country can be viewed on the Institute for Justice's Web site, www.ij.org.)

In issuing their ruling today, the justices reversed the United States Court of Appeals for the Second Circuit, which had affirmed the New York law, and it upheld the Court of Appeals for the Sixth Circuit, which had voided the Michigan law.

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U.S. Supreme Court Rules on Direct Shipping

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On May 16, 2005, the United States Supreme Court struck down direct shipping laws in Michigan and New York holding that the laws in both States discriminate against interstate commerce in violation of the Commerce Clause, and that the discrimination is neither authorized nor permitted by the 21st Amendment.

For wineries and wholesalers, *Granholm v. Heald* is notable for different reasons. For wineries, the case makes clear that States' powers to regulate alcohol under the 21st Amendment are not absolute, and that States must treat in-state and out-of-state wineries the same when it comes to the direct shipment of wine. For wholesalers, the decision reaffirmed the legitimacy of the three-tier system and did not establish a right to direct ship.

While the decision is a clear victory for those in favor of direct shipping, the real impact will only be known once we see how States choose to rewrite their laws to respond to the decision, and how the lower courts apply the decision to future challenges to the three-tier system.

Background: The Battle for Shelf Space in a Consolidating Industry

In striking down the Michigan and New York laws, the U.S. Supreme Court recognized the significant and ongoing consolidation in the wine industry. Fewer wineries and fewer distributors now control a larger than ever portion of the wine market, making it increasingly difficult for small wineries to distribute their wines.

At the same time that large wineries and distributors are consolidating, the number of small wineries in the United States is proliferating rapidly, making competition for retail shelf space even fiercer. Furthermore, as the Court noted, even if small wineries could find distributors for their wine in States that prohibit direct shipping, the distributor's mark-up would render such sales through the three-tier system economically infeasible.

As a result, more and more small wineries are turning to direct sales – via the tasting room, mailing list and over the Internet -- as the principal means to sell their wine. This is especially true given the recent technological advancements allowing for the sale of wine over the Internet, without the need for any physical contact with the customer at all.

The States' Powers Are Not Absolute

The States put forth three main arguments to justify discriminatory restrictions on out-of-state wineries: preventing the direct sale of alcohol to minors, improving the ability of states to collect sales tax, and that alcohol is simply different than other articles of commerce. None of these arguments persuaded the Court.

With regard to preventing the direct sale of alcohol to minors, the Court found that minors are less likely to consume wine as opposed to other forms of alcohol, and that minors have easier and quicker means to obtain alcohol than direct purchase through the mail. Moreover, less restrictive means are available to prevent the direct sale of alcohol to minors through the mail; such as requiring an adult signature for delivery and a label stating the requirement on the package itself.

With regard to the collection of sales tax, the Court found that if licensing and self-reporting provide adequate tax collection safeguards for wine distributed through the three-tier system, such mechanisms should work for direct shipments as well. States could require a license as a condition of direct shipping, with a requirement for licensees to submit sales reports and pay sales taxes. Notably, this is the approach recommended by the National Conference of Legislatures in their Model Direct Shipping Bill.

The third justification – that States' should be able to discriminate with regard to commerce in alcohol because alcohol is a unique article of commerce—is harder to dismiss. Concerns about the evils of alcohol abuse are so strong in our nation's history that a State's right to regulate the commerce of alcohol is enshrined in the Constitution itself. Despite acknowledging the unique history of alcohol in the United States, and that States have near absolute power to regulate the commerce of alcohol, the Court refused to allow the States to do so in a discriminatory manner. If a State desires to restrict the commerce of alcohol, it must do so in a way that does not differentiate based on whether a business is located in state or not.

The 21st Amendment and its Limitations

As clear as the Court was in holding that States' may not discriminate against out-of-state wineries with regard to the direct shipment of wine, the Court was equally clear in upholding the validity of the three-tier system and the States' rights to regulate or even ban the commerce of alcohol. The Court noted that the three-tier system is "unquestionably legitimate" and that the 21st Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.

States' powers to regulate commerce in alcohol are limited only by other provisions of the Constitution itself. In this case, the Court held the Commerce Clause—which stands for the proposition that States cannot treat businesses differently based on whether the business is located in or out of state—trumps the 21st Amendment. According to Justice Kennedy, "If a State chooses to allow direct shipments of wine, it must do so on evenhanded terms."

Unintended Consequences: Are Reciprocal Laws Unconstitutional?

Although the ruling focuses on two States' laws that clearly discriminate against out-of-state wineries, the decision likely renders unconstitutional the direct shipping laws of other States whose laws are not commonly viewed as discriminatory. Good examples are those States with so-called reciprocal laws—laws that allow direct shipping only from States who in turn allow direct shipping into their State.

Ironically, California is a prime example of a State whose reciprocal direct shipping laws are now arguably unconstitutional under *Granholm v. Heald*. In fact, the Supreme Court in its ruling specifically mentioned California's reciprocal laws as illustrating the type of fragmented, alliance-driven patchwork of laws that has led to discrimination against out-of-state wineries. As the Court stated: "The current patchwork of laws—with some States banning direct shipments altogether, other doing so only for out-of-state wines, and still others requiring reciprocity—is essentially the product of an ongoing, low-level trade war."

Anticipating a challenge, the California Family Winemakers and the Wine Institute, among others, are already working on direct shipping amendments to replace the existing reciprocal laws in California with laws allowing for direct shipping from all States, regardless of reciprocity.

More Questions Than Answers: What Now?

It is worth repeating that the Court's decision does not authorize direct shipping. In fact, for those States that prohibit all direct shipping, the ruling has no direct affect because such laws treat in-state and out-of-state wineries the same. For those States whose laws do discriminate in one form or another, as stated by the Wine Institute, these states will have to take some legislative or regulatory action to address the discrimination issue and to build a framework for shipments to be made.

The ruling does suggest that requiring a physical presence in-state as a condition to direct ship is unconstitutional. This calls into question state laws that require in-state retailers, who buy from wholesalers, to buy from wholesalers located in-state. Costco is currently challenging such a law, among others, in the State of Washington. Also called into question are laws that allow in-state wineries, but not out-of-state wineries, to sell directly to restaurants and other retailers located in-state. Such a law currently exists in California, and if repealed, would adversely affect many California wineries that rely heavily on local retail direct sales.

Another broader question is in those States where the legislature requires all alcohol sales to go through a licensed entity, can these States require that the licensee maintain a physical in-state presence? From one perspective, the Court suggests it strongly disfavors state statutes that require in-state business operations. On the other hand, the three-tier system's middle tier is highly dependent on the in-state business requirement, and the Court went out of its way to declare the three-tier system as "unquestionably legitimate."

Although these positions seem at odds with each other, one way to reconcile them might be to reinterpret the Court's holding to be that States may not discriminate against out-of-state wineries *unless they have a good reason for doing so*. Thus far, the States' arguments have not been persuasive. It remains to be seen whether the lower courts will allow certain types of discrimination to survive if the States are able to provide strong enough justifications for doing so.

For example, what if States focused regulations on production amounts rather than the location of the winery? If States could assure wholesalers that the largest wineries would have to use the three-tier system, the wholesalers' interests might be satisfied. For smaller wineries, their low production could qualify them for an exemption from the three-tier system and allow them to direct ship.

The Opportunity and the Danger: Legislative Free for All

For all the noise this case has generated, the only thing we know for sure is that many States legislatures will be called on to rewrite their direct shipping laws. This presents an opportunity for wineries to push for legislatures to open their laws to direct shipping. However, it also presents a danger that the powerful wholesalers' lobby will convince State legislatures to impose more onerous restrictions on direct shipping than already exist, or to shut direct shipping down completely. Even in states like California where the wineries are at their strength, direct shipping proponents have an uphill battle to push through any legislation without the support of the wholesalers' lobby.

As part of any new legislation, many believe the wholesalers' lobby will push hard to include onerous paperwork, licensing and fee requirements in an attempt to make it as inconvenient and expensive as possible to direct ship. The more onerous the paperwork, the license requirements and the fees, the less wineries stand to gain.

 FARELLA BRAUN + MARTEL LLP

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Letters of Support



WINE INSTITUTE

KATIE JACOY
WESTERN COUNSEL

February 6, 2007

Representative Gabrielle LeDoux
Alaska State Capitol
Juneau, AK 99801

Re: Wine Institute Supports House Bill 34

Dear Representative LeDoux:

Wine Institute, representing 886 California wineries, supports the local wine industry's effort to obtain a direct-to-consumer shipping privilege. HB 34 permits Alaska wineries to ship up to 5 gallons (about 25 - 750ml bottles) of wine to an individual in Alaska where importation is not prohibited. Most wineries around the country rely on direct-to-consumer shipping to service their customers' requests when a wine is not readily available to all consumers locally. WI recognizes that the direct-to-consumer shipping privilege is critical to satisfy consumer demand and to the growth and success of local wine industries, like Alaska's.

Sincerely,

Katie Jacoy
Western Counsel

Christine Marasigan

From: Rep. Gabrielle LeDoux
Sent: Friday, February 16, 2007 12:03 PM
To: Christine Marasigan
Subject: FW: Shipping of Alaska Wine

Suzanne Hancock, Chief of Staff
Representative Gabrielle LeDoux
State Capitol
District 36
Juneau, AK 99801-1121
phone: (907) 465-2487 (office)
(907) 465-4230 (direct)
fax: (907) 465-4956

-----Original Message-----

From: Judy Beauchemin-Hall [mailto:Judy@KlondikeGoldDredge.com]
Sent: Friday, February 16, 2007 12:02 PM
To: Rep. Gabrielle LeDoux
Subject: Shipping of Alaska Wine

My name is Judy Beauchemin-Hall and I am the owner of Denali Winery in Anchorage. We have been producing wines in Anchorage for the last ten years. Over the years I have tried to expand my business to be able to ship to customers in other states. I have talked to many different State Alcohol Boards trying to be able to ship our wine to the lower 48 with lots of frustration.

Thank you for all your hard work to get the legislature through to allow Alaskan Winery's to be able to ship their wine out of Alaska. This really supports and helps small business in Alaska to be able to compete on the internet with other wineries.

Thank you again.

Judy Beauchemin-Hall
President
Denali Winery
(mailing) PO Box 558, Skagway, AK 99840
(physical) 1301 E Dowling Rd., #107
Anchorage, AK 99518-1436

PH: (907) 983-3175
FAX (907) 983-3176
CELL (907) 723-1529

Dear Representatives,

2/12/07

Under current statutes a private citizen in Alaska, such as yourself, can buy wine directly from wineries in other states via the internet but you cannot buy wine directly from an Alaskan winery. House Bill 34 will allow you the freedom to "Buy Alaska" if you so choose.

This developing Alaska industry needs your support to prosper. Please support Alaskan businesses and pass House Bill 34.

Steven Thomsen
Alaskan Wilderness Wines



State of Alaska
Department of Public Safety
Alcoholic Beverage Control Board

Sarah Palin, Governor
Walt Monegan, Commissioner

April 6, 2007

Senator Johnny Ellis, Chairman,
Senate Labor and Commerce Committee
State Capitol
Room 9
Juneau, Alaska 99801-1182

RE: HB 34 – Sales by Winery Licensee

Dear Senator Ellis:

I am responding at your request to place my position as Director of the Alcoholic Beverage Control on record and provide more complete information on to the record regarding HB 34. I do support the bill based on the explanation given to your committee on April 3, 2007 by Representative LeDoux and her aide Christine Marasigan. HB 34 simply allows Alaska based wineries to ship limited quantities of the product they manufacture directly to consumers for personal use. Presently, out-of-state wineries can directly ship to consumers if such shipment is legal under Alaska law.

Based on some of the questions raised by members of your committee, I have attached some additional material that I believe will provide your Committee with a more complete information. All of the information provided is enlightening, but I have highlighted particularly germane passages. The first enclosure (Attachment #1) are federal statutes that articulate generally that liquor laws and police powers of states apply to alcoholic beverages transported into the states (page 1 of 6). At the bottom of page 2 the law reflects changes made in 2000 that allows states through their respective attorneys general to seek injunctive relief in Federal district court for violation of "a State law regulating the importation or transportation of any intoxicating liquor". This is the mechanism that would have to be employed if an out-of-state winery violated Alaska law related to shipping wine to a "dry" local option community. Finally, following September 11, 2001, a federal law was passed addressing the shipment of wine (page 6 of 6) by persons present at a winery. Several safeguards are listed, including one that "the purchaser could have carried the wine lawfully into the State...to which the wine is shipped". It would, of course, not be lawful to carry or ship wine into a "dry" local option community in Alaska.

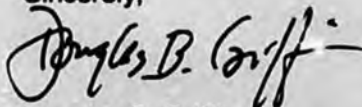
Attachment #2 is testimony from the U.S. Federal Trade Commission that relates to trade barriers to E-Commerce. This report relates how the sale of wine is particularly well suited for e-commerce and that based on the studies and review of the FTC, states have experienced "few, if any, problems with interstate direct shipment or wine to minors." This finding tracks with our experience in Alaska. We have received no complaints regarding underage persons securing alcoholic beverages via the Internet.

Attachments # 3 and #4 are statements put out by the Wine Institute, a pro-wine shipment organization representing California wineries, further expounding on the federal law changes and the FTC testimony. Attachment #5 is the Alaska page from the Wine Institute's web page. As you can see it does explain Alaska's unique local option situation, provides contact information for our agency, and even provides a link to FedEx approved zip codes.

AS 04.11.150(a) requires package stores to "notify the board in writing of the licensee's intention to ship alcoholic beverages in response to a written solicitation." AS 04.11.395 gives the Alcoholic Beverage Control Board the ability impose conditions or restrictions on a license if it is in the best interests of the public. If a package store violates written order statutes or regulations, the ABC Board could exercise its authority under AS 04.11.395 to restrict package stores from selling in this manner.

I hope this information proves responsive to the questions raised by the committee.

Sincerely,



Douglas B. Griffin
Director

Enclosures

cc: Representative Gabrielle LeDoux
Anne Carpeneti, Asst. Attorney General, Department of Law
Lauren Rice, Special Assistant, Department of Public Safety

-CITE-

27 USC CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE 01/03/05

-EXPCITE-

TITLE 27 - INTOXICATING LIQUORS
CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-HEAD-

CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-MISC1-
Sec.

- 121. State statutes as operative on termination of transportation; original packages.
- 122. Shipments into States for possession or sale in violation of State law.
- 122a. Injunctive relief in Federal district court.
 - (a) Definitions.
 - (b) Action by State attorney general.
 - (c) Federal jurisdiction.
 - (d) Requirements for injunctions and orders.
 - (e) Rules of construction.
 - (f) Additional remedies.
- 122b. General provisions.
 - (a) Effect on Internet Tax Freedom Act.
 - (b) Inapplicability to service providers.
- 123. Repealed.
- 124. Direct shipment of wine.
 - (a) Conditions for transporting certain wine.
 - (b) Violations.
 - (c) Report.

-End-

-CITE-

27 USC Sec. 121 01/03/05

-EXPCITE-

TITLE 27 - INTOXICATING LIQUORS
CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-HEAD-

Sec. 121. State statutes as operative on termination of transportation; original packages

-STATUTE-

All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

-SOURCE-

(Aug. 8, 1890, ch. 728, 26 Stat. 313.)

-MISC1-

SHORT TITLE
Act Aug. 8, 1890, is popularly known as the "Wilson Act" or the "Original Packages Act".

-End-

-CITE-

27 USC Sec. 122

01/03/05

-EXPCITE-

TITLE 27 - INTOXICATING LIQUORS
CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-HEAD-

Sec. 122. Shipments into States for possession or sale in violation of State law

-STATUTE-

The shipment or transportation, in any manner or by any means whatsoever, of any spirituous, vinous, malted, fermented, or other intoxicating liquor of any kind, from one State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, into any other State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, or from any foreign country into any State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, which said spirituous, vinous, malted, fermented, or other intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such State, Territory, or District of the United States, or place noncontiguous to but subject to the jurisdiction thereof, is prohibited.

-SOURCE-

(Aug. 27, 1935, ch. 740, Sec. 202(b), 49 Stat. 877.)

-MISC1-

PRIOR PROVISIONS

Provisions similar to those in this section were contained in the act of Mar. 1, 1913, ch. 90, Sec. 1, 37 Stat. 699.

SHORT TITLE

Act Mar. 1, 1913, is popularly known as the "Webb-Kenyon Act".

-End-

-CITE-

27 USC Sec. 122a

01/03/05

-EXPCITE-

TITLE 27 - INTOXICATING LIQUORS
CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-HEAD-

Sec. 122a. Injunctive relief in Federal district court

-STATUTE-

(a) Definitions

In this section -

(1) the term "attorney general" means the attorney general or other chief law enforcement officer of a State or the designee thereof;

(2) the term "intoxicating liquor" means any spirituous,

vinous, malted, fermented, or other intoxicating liquor of any kind;

(3) the term "person" means any individual and any partnership, corporation, company, firm, society, association, joint stock company, trust, or other entity capable of holding a legal or beneficial interest in property, but does not include a State or agency thereof; and

(4) the term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or possession of the United States.

(b) Action by State attorney general

If the attorney general has reasonable cause to believe that a person is engaged in, or has engaged in, any act that would constitute a violation of a State law regulating the importation or transportation of any intoxicating liquor, the attorney general may bring a civil action in accordance with this section for injunctive relief (including a preliminary or permanent injunction) against the person, as the attorney general determines to be necessary to -

(1) restrain the person from engaging, or continuing to engage, in the violation; and

(2) enforce compliance with the State law.

(c) Federal jurisdiction

(1) In general

The district courts of the United States shall have jurisdiction over any action brought under this section by an attorney general against any person, except one licensed or otherwise authorized to produce, sell, or store intoxicating liquor in such State.

(2) Venue

An action under this section may be brought only in accordance with section 1391 of title 28 or in the district in which the recipient of the intoxicating liquor resides or is found.

(3) Form of relief

An action under this section is limited to actions seeking injunctive relief (a preliminary and/or permanent injunction).

(4) No right to jury trial

An action under this section shall be tried before the court.

(d) Requirements for injunctions and orders

(1) In general

In any action brought under this section, upon a proper showing by the attorney general of the State, the court may issue a preliminary or permanent injunction to restrain a violation of this section. A proper showing under this paragraph shall require that a State prove by a preponderance of the evidence that a violation of State law as described in subsection (b) of this section has taken place or is taking place.

(2) Additional showing for preliminary injunction

No preliminary injunction may be granted except upon -

(A) evidence demonstrating the probability of irreparable injury if injunctive relief is not granted; and

(B) evidence supporting the probability of success on the merits.

(3) Notice

No preliminary or permanent injunction may be issued under paragraph (1) without notice to the adverse party and an opportunity for a hearing.

(4) Form and scope of order

Any preliminary or permanent injunction entered in an action brought under this section shall -

(A) set forth the reasons for the issuance of the order;

(B) be specific in terms;

(C) describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and

(D) be binding upon -

(i) the parties to the action and the officers, agents,

employees, and attorneys of those parties; and
(ii) persons in active concert or participation with the parties to the action who receive actual notice of the order by personal service or otherwise.

(5) Admissibility of evidence

In a hearing on an application for a permanent injunction, any evidence previously received on an application for a preliminary injunction in connection with the same civil action and that would otherwise be admissible, may be made a part of the record of the hearing on the permanent injunction.

(e) Rules of construction

This section shall be construed only to extend the jurisdiction of Federal courts in connection with State law that is a valid exercise of power vested in the States -

(1) under the twenty-first article of amendment to the Constitution of the United States as such article of amendment is interpreted by the Supreme Court of the United States including interpretations in conjunction with other provisions of the Constitution of the United States; and

(2) under section 122 of this title as such section is interpreted by the Supreme Court of the United States; but shall not be construed to grant to States any additional power.

(f) Additional remedies

(1) In general

A remedy under this section is in addition to any other remedies provided by law.

(2) State court proceedings

Nothing in this section may be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any State law.

-SOURCE-

(Mar. 1, 1913, ch. 90, Sec. 2, as added Pub. L. 106-386, div. C, Sec. 2004(a), Oct. 28, 2000, 114 Stat. 1546.)

-MISC1-

EFFECTIVE DATE

Pub. L. 106-386, div. C, Sec. 2004(b), Oct. 28, 2000, 114 Stat. 1548, provided that: "This section [enacting this section and section 122b of this title and provisions set out as a note under this section] and the amendments made by this section shall become effective 90 days after the date of the enactment of this Act [Oct. 28, 2000]."

IMPACT STUDY

Pub. L. 106-386, div. C, Sec. 2004(c), Oct. 28, 2000, 114 Stat. 1548, provided that: "The Attorney General shall carry out the study to determine the impact of this section [enacting this section and section 122b of this title and provisions set out as a note under this section] and shall submit the results of such study not later than 180 days after the enactment of this Act [Oct. 28, 2000]."

-End-

-CITE-

27 USC Sec. 122b

01/03/05

-EXPCITE-

TITLE 27 - INTOXICATING LIQUORS
CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-HEAD-

Sec. 122b. General provisions

-STATUTE-

(a) Effect on Internet Tax Freedom Act

Nothing in this section may be construed to modify or supersede the operation of the Internet Tax Freedom Act (47 U.S.C. 151 note).

(b) Inapplicability to service providers

Nothing in this section may be construed to -

(1) authorize any injunction against an interactive computer service (as defined in section 230(f) of title 47 (!1) used by another person to engage in any activity that is subject to this Act;

(2) authorize any injunction against an electronic communication service (as defined in section 2510(15) of title 18) used by another person to engage in any activity that is subject to this Act; or

(3) authorize an injunction prohibiting the advertising or marketing of any intoxicating liquor by any person in any case in which such advertising or marketing is lawful in the jurisdiction from which the importation, transportation or other conduct to which this Act applies originates.

-SOURCE-

(Mar. 1, 1913, ch. 90, Sec. 3, as added Pub. L. 106-386, div. C, Sec. 2004(a), Oct. 28, 2000, 114 Stat. 1548.)

-REFTEXT-

REFERENCES IN TEXT

The Internet Tax Freedom Act, referred to in subsec. (a), is title XI of Pub. L. 105-277, div. C, Oct. 21, 1998, 112 Stat. 2681-719, which is set out as a note under section 151 of Title 47, Telegraphs, Telephones, and Radiotelegraphs.

This Act, referred to in subsec. (b), is act Mar. 1, 1913, ch. 90, 37 Stat. 699, as amended, popularly known as the Webb-Kenyon Act, which is classified to this section and sections 122 and 122a of this title. For complete classification of this Act to the Code, see Tables.

-MISC1-

EFFECTIVE DATE

Section effective 90 days after Oct. 28, 2000, see section 2004(b) of Pub. L. 106-386, set out as a note under section 122a of this title.

-FOOTNOTE-

(!1) So in original. Probably should be followed by a closing parenthesis.

-End-

-CITE-

27 USC Sec. 123

01/03/05

-EXPCITE-

TITLE 27 - INTOXICATING LIQUORS
CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-HEAD-

Sec. 123. Repealed. June 25, 1936, ch. 815, Sec. 9, 49 Stat. 1930

-MISC1-

Section, acts Mar. 3, 1917, ch. 162, Sec. 5, 39 Stat. 1069; Mar. 4, 1917, ch. 192, 39 Stat. 1202; Feb. 24, 1919, ch. 18, Sec. 1407,

40 Stat. 1151; Jan. 11, 1934, ch. 1, title I, Sec. 12, 48 Stat. 316, prescribed punishment for violation of section 122 of this title.

-End-

-CITE-

27 USC Sec. 124

01/03/05

-EXPCITE-

TITLE 27 - INTOXICATING LIQUORS
CHAPTER 6 - TRANSPORTATION IN INTERSTATE COMMERCE

-HEAD-

Sec. 124. Direct shipment of wine

-STATUTE-

(a) Conditions for transporting certain wine

During any period in which the Federal Aviation Administration has in effect restrictions on airline passengers to ensure safety, the direct shipment of wine shall be permitted from States where wine is purchased from a winery, to another State or the District of Columbia, if -

- (1) the wine was purchased while the purchaser was physically present at the winery;
- (2) the purchaser of the wine provided the winery verification of legal age to purchase alcohol;
- (3) the shipping container in which the wine is shipped is marked to require an adult's signature upon delivery;
- (4) the wine is for personal use only and not for resale; and
- (5) the purchaser could have carried the wine lawfully into the State or the District of Columbia to which the wine is shipped.

(b) Violations

If any person fails to meet any of the conditions under subsection (a) of this section, the attorney general of any State may bring a civil action under the same terms as those set out in section 122a of this title.

(c) Report

Not later than 2 years after November 2, 2002, and at 2-year intervals thereafter, the Attorney General of the United States, in consultation with the Administrator of the Federal Aviation Administration, shall prepare and submit to the Committee on the Judiciary of the Senate and to the Committee on the Judiciary of the House of Representatives a report on the implementation of this section.

-SOURCE-

(Pub. L. 107-273, div. C, title I, Sec. 11022, Nov. 2, 2002, 116 Stat. 1829.)

-End-

Prepared Statement of
the Federal Trade Commission

Before the

Subcommittee on Commerce, Trade, and Consumer Protection
Committee on Energy and Commerce
United States House of Representatives

Washington, D.C.

October 30, 2003

I. Introduction

Mr. Chairman, I am Todd Zywicki, Director of the Federal Trade Commission's Office of Policy Planning. (1) I am pleased to appear before the Subcommittee today to testify on behalf of the Commission regarding "E-Commerce: The Case of Online Wine Sales and Direct Shipment." The wine issue is the subject of a recent staff report entitled "Possible Anticompetitive Barriers to E-commerce: Wine," (2) and is representative of the types of policies that are impacting e-commerce in many different industries across the nation. The Commission would like to thank Chairman Stearns for his excellent leadership in this area and for his efforts to promote e-commerce and consumer welfare. The Commission would also like to thank the Subcommittee for its continued interest in studying potential anticompetitive barriers to e-commerce. Last September, this Subcommittee held a hearing entitled "State Impediments to E-Commerce: Consumer Protection or Veiled Protectionism?" that focused on the e-commerce issues in three industries: auctions, contact lenses, and wine. (3)

II. Overview of Possible Anticompetitive Barriers to E-Commerce

The Internet enables consumers to purchase an unprecedented array of goods and services from the convenience of their homes. Consumers can find and purchase thousands of goods, from thousands of suppliers around the country, and have those goods delivered to their doors. Moreover, perhaps for the first time, consumers can also conveniently purchase a wide array of services from distant sources. Consumers can obtain legal and medical advice, realtor services, and an education from out-of-state online suppliers. In many instances, these consumers may find lower prices and a greater variety of goods and services online than in bricks-and-mortar stores.

The Internet, however, also raises regulatory concerns about online fraud and other abuses. As a result, many states have adopted regulations that may limit consumers' ability to buy certain goods and services online. For example, some states require that online vendors maintain a physical office in the state, while other states prohibit online sales or shipments of certain products entirely. Many states also require that out-of-state suppliers obtain an in-state license before selling particular goods, like wine or caskets, or services, like medical or legal advice. Although many of these regulations may have legitimate consumer protection rationales, many of them also have the effect of insulating local businesses from out-of-state competitors.

In October 2002, the Federal Trade Commission held a workshop to study these issues. Over three days, Commission staff heard testimony on possible anticompetitive barriers to e-commerce in many different industries: auctions; automobiles; caskets; contact lenses; cyber-charter schools; online legal services; real estate, mortgages, and financial services; retailing; telemedicine and online pharmaceutical sales; and wine. For each industry, Commission staff gathered evidence from many different perspectives, including online companies, bricks-and-mortar businesses, consumer groups, academics, state officials, and others. The staff also invited and received comments from the public at large. (4)

As part of the process of examining possible barriers to e-commerce, the Commission has strongly encouraged policymakers to adopt rules that encourage e-commerce. For example, the Commission filed a joint comment with the Department of Justice before the North Carolina State Bar opposing two new opinions that would require the physical presence of an attorney for all real estate closings and refinancings, which would significantly increase the costs of Internet lenders that rely disproportionately on lay closers. (5) The Commission also filed joint FTC/DOJ comments before the Rhode Island legislature and Georgia State Bar on similar issues. (6) On the health care front, the Commission filed a staff comment before the Connecticut Board of Opticians, which was considering additional restrictions on out-of-state and Internet contact lens sellers. (7) The Commission has also filed *amicus* briefs to promote competition. For example, the FTC recently participated in a court challenge to a state law that banned anyone other than licensed funeral directors from selling caskets to members of the public over the Internet. While recognizing the state's intent to protect its consumers, the brief questioned whether the law did more harm than good. (8)

III. Wine

A. Background

Wine is a good example of how the Internet can permit fundamentally different business models to flourish. Through the Internet, many smaller vineyards, with limited distribution networks, can now market their wines to consumers around the country. Consumers also can potentially save money by buying online, avoiding markups by wholesalers and retailers. Online wine sales are a small but growing percentage of the wine market. From 1994-99, consumers doubled the amount of money they spent having wine shipped directly to them to around \$500 million, or about 3% of the total spent on wine. (9) According to some private estimates, online wine sales could account for 5-10% of the market within a few years. (10)

On the other hand, many states limit or prohibit direct wine sales over the Internet. Under the common "three tier" distribution system, many states require that wine pass through a wholesaler or a retailer before reaching the consumer. These states, and many commentators, contend that the distribution system furthers the state's interest in taxation, advances the Twenty-First Amendment's important public policy goal of temperance, and helps prevent alcohol sales to minors. Lawsuits are pending in many states regarding the direct shipment of wine, although the FTC has taken no position on the constitutional issues raised in the lawsuits.

At the workshop, Commission staff heard testimony from all sides of the wine issue, including wineries, wholesalers, state regulators, and a Nobel laureate in economics. Commission staff also gathered evidence from a wide variety of published sources, such as studies and court decisions, and from other sources, such as package delivery companies and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (now the Alcohol and Tobacco Tax and Trade Bureau). Finally, FTC staff studied the wine market in a state that until recently banned direct shipment of wine to consumers from out-of-state sources, and, as a result, banned most online wine sales. In particular, the study examined the wine market in McLean, Virginia, and compared the prices and choices that consumers could find in area stores to the prices and choices that consumers could find online.

B. FTC Staff Report

Commission staff wrote the report based on the study of the McLean market, testimony received at the workshop, and additional research. The Commission's staff report assesses the impact on consumers of barriers to e-commerce in wine. The report also surveys the alternative policies adopted by many of the states that permit their citizens to order and receive wine from out-of-state sources.

1. Benefits of E-Commerce

The report concludes that states could significantly enhance consumer welfare by allowing the direct shipment of wine to consumers. Through direct shipping, consumers can purchase many wines online that are not available in nearby bricks-and-mortar stores. The McLean study found that 15% of a sample of wines available online were not available from retail wine stores within ten miles of McLean. Similarly, testimony unambiguously reveals that, by banning interstate direct shipments, states seriously limit consumers' access to thousands of labels from smaller wineries.(11)

Moreover, the report finds that, depending on the wine's price, the quantity purchased, and the method of delivery, consumers can save money by purchasing wine online. Because shipping costs do not vary with the wine's price, consumers can save more money on more expensive wines, while less expensive wines may be cheaper in bricks-and-mortar stores. The McLean study suggests that, if consumers use the least expensive shipping method, they could save an average of 8-13% on wines costing more than \$20 per bottle and an average of 20-21% on wines costing more than \$40 per bottle.(12)

2. Barriers to E-Commerce

In terms of the regulatory regime, the report finds that state bans on interstate direct shipping represent the single largest regulatory barrier to expanded e-commerce in wine. Approximately half the states prohibit or severely restrict out-of-state suppliers from shipping wine directly to consumers. In approximately seven states, interstate direct shipping can be prosecuted as a felony. Many of these same states, however, allow intrastate direct shipping, such as from in-state wineries and retailers.(13) Besides the direct shipping bans, many other regulations impede e-commerce in wine. These include prohibitions on online orders, very low ceilings on annual purchases, bans on advertising from out-of-state suppliers, requirements that individual consumers purchase "connoisseurs' permits," and requirements that delivery companies obtain a special individual license for every vehicle that might be used to deliver wine.(14)

3. Underage Drinking

The direct shipping debate involves other public policy goals. For example, citizens are concerned about the direct shipment of wine to minors. To gather information on the actual experiences of states that allow interstate direct shipping, FTC staff contacted officials from numerous reciprocity and limited importation states and asked them a variety of questions, including whether they had experienced problems with interstate direct shipping to minors. Most of the surveyed states provided written responses. Staff also reviewed testimony from a California alcohol regulator who had testified before California's legislature.

In general, these state officials report that they have experienced few, if any, problems with interstate direct shipment of wine to minors. Most of them do not believe that interstate direct shipment of wine to minors is currently a serious problem, although several of them believe that it is possible for minors to buy wine online. None of them report more than isolated instances of minors buying or even attempting to buy wine online. Some of them, such as California, have monitored the issue of alcohol delivery to minors for years or even decades.(15)

These state officials offer many possible explanations for their experiences. Several state officials opined that minors are more interested in beer and spirits than wine.(16) New Hampshire concluded that minors are less likely to purchase wine online because of the extra expense of ordering over the Internet.(17) These conclusions correspond with the McLean study, which found that when transportation costs are included, lower-end wines are more expensive when purchased over the Internet than through the three-tier system.(18) Minors would have to pay a hefty premium, from 33-83%, to purchase a bottle of wine costing less than \$20 online and have it delivered to them via 2nd Day Air.

Several state officials commented that, based on their experience, minors were much more likely to buy alcohol through offline sources than over the Internet.(19) In a 2002 survey, large percentages of high school students, from 68-95%, said that it is "fairly easy" or "very easy" to get alcohol.(20) In examining offline and online stings, there are not enough data from which to conclude that minors can buy wine more easily or less easily online than offline (among other reasons, there is far more sting data about offline sales). In the absence of such information, it is difficult to ascertain whether online wine sellers are, or would be, a significant source of alcohol for minors.

Of course, the fact that states have received few complaints about direct shipments to minors does not establish that minors are not purchasing wine online. As noted by a Michigan Assistant Attorney General, minors who buy wine online are unlikely to report their purchases to the authorities, and neither the package delivery company nor the supplier may know or care that they are delivering wine to a minor.(21) The FTC cannot rule out the possibility that minors are buying wine online undetected by state officials.

The report, however, finds two clear results. First, several states that permit interstate direct shipping have adopted various procedural safeguards and enforcement mechanisms to prevent sales to minors. New Hampshire, for example, requires an adult signature at the time of delivery, permanently revokes the direct shipping permit of anyone who ships wine to minors, and declares him guilty of a class B felony.(22) Second, states that allow interstate direct shipping generally say that direct shipping to minors currently is not a serious

problem, and that they have received few or no complaints about direct shipping to minors.

4. Tax Collection

The report finds that some states also have adopted less restrictive means of protecting tax revenues while permitting direct shipping, such as by requiring out-of-state suppliers to obtain permits and to collect and remit taxes.⁽²³⁾ Most of these states report few, if any, problems with tax collection. Nebraska, for example, reports that they "have also not, as yet, had any problems with the collection of excise tax(es)."⁽²⁴⁾ North Dakota reports that "Taxes are collected. No problems to date that we are aware of."⁽²⁵⁾ The staff report finds that, to the extent that states have problems with out-of-state suppliers, they have addressed the problem in less restrictive ways than banning all interstate direct shipping. Other states with reciprocity agreements forego taxing interstate direct shipments altogether.

5. Less Restrictive Alternatives

As mentioned previously, the report finds that some states have adopted less restrictive means to satisfy their regulatory objectives an alternative to banning interstate direct shipment of wine. For example, some states register out-of-state suppliers and impose various civil and criminal penalties against violators. Several states, including Nebraska, New Hampshire, and Wyoming, require out-of-state suppliers to register and obtain permits for a reasonable fee (a permit can be conditioned on the out-of-state supplier's consent to submit to the state's jurisdiction). None of these states reported any problems with interstate direct shipping to minors.⁽²⁶⁾

In addition, some states have applied the same types of safeguards to online sales that already apply to bricks-and-mortar retailers, such as requirements that package delivery companies obtain an adult signature at the time of delivery. Unfortunately, there is no systematic empirical data revealing how often couriers obtain a valid adult signature. FTC staff contacted both FedEx and UPS, and neither company keeps such records. Both companies, however, have adopted policies that require their couriers to obtain adult signatures.

IV. Conclusion

For these reasons, the staff report concludes that consumers could reap significant benefits if they had the option of purchasing wine online from out-of-state sources and having it shipped directly to them. Consumers could save money, choose from a much greater variety of wines, and enjoy the convenience of home delivery. Indeed, in states that are litigating the constitutionality of direct shipping bans, several courts have found that the bans deprive the state's consumers of lower prices and greater variety. In addition, many states appear to have found means of satisfying their tax and other regulatory goals that are less restrictive than an outright ban. These states generally report few or no problems with shipments to minors or with tax collection.

The report has general implications for e-commerce. Anticompetitive state regulations can insulate local suppliers from online competition and deprive consumers of lower prices and greater selection. Although states have legitimate regulatory goals in protecting consumers, they may have less restrictive alternatives that would allow online competition and, ultimately, provide the greatest benefits to consumers.

The wine debate illustrates several key principles that policymakers should consider as they address the growth of e-commerce:

- **Legacy laws can unintentionally inhibit e-commerce.** In many cases, state bans on interstate direct shipment of wine exist not as a response to e-commerce, but because the three-tier distribution system developed before the Internet even existed. As e-commerce continues to expand, the potential cost to consumers of restrictions will rise. Consequently, legacy laws that inhibit e-commerce merit re-examination.
- **New laws restricting e-commerce deserve careful scrutiny.** Not all restrictions or penalties for direct shipping are of ancient vintage. Some states, for example, have recently converted interstate direct shipping from a misdemeanor to a felony. On numerous workshop panels, consumer representatives and scholars warned that new restrictions on e-commerce often are driven more by the desire to protect established businesses than to protect consumers. Given this risk, proposals for new restrictions on e-commerce, or harsher penalties for existing violations of the law, deserve careful scrutiny.
- **Not all licensing is created equal.** Some states that permit interstate direct shipping use licenses and permits to make suppliers identify themselves and agree to abide by the state's laws. Such licensing appears to have little negative impact on e-commerce. In other states, however, high license fees or cumbersome procedures impede e-commerce by imposing substantial costs on suppliers, delivery companies, and consumers. For states that favor licensing, the key challenge is to craft a licensing regime that is only as burdensome as necessary to satisfy the state's objectives. Reciprocal licensing agreements with other states may provide one means of accomplishing regulatory objectives at lower costs to consumers.
- **States may have alternatives to in-state office requirements.** A common argument for prohibiting interstate direct shipping is that states can only enforce the law against in-state suppliers. This argument also arises in other contexts where states require sellers of goods or services to maintain in-state offices and hire state residents. States may, however, have less burdensome means of regulating out-of-state suppliers. Through permits and cooperation with federal law enforcement agencies and other states' enforcement agencies, states may be able to permit e-commerce while still satisfying their regulatory objectives.
- **Not all "level playing fields" benefit consumers equally.** In the wine context, states could "level the playing field" either by prohibiting all direct shipping or by permitting interstate as well as intrastate direct shipping. The FTC staff study of McLean, Virginia suggests that Virginia consumers will benefit from the Commonwealth's recent decision to achieve policy neutrality by legalizing interstate direct shipping. Virginia's experience illustrates a general principle: although there are many ways to avoid discriminating against a group of suppliers, a pro-consumer approach would attempt to achieve policy neutrality by expanding consumer choice.

Thank you for this opportunity to share the Commission's views. The Commission looks forward to working with the public and with the Subcommittee to help give consumers the full benefits of online commerce.

Endnotes:

1. The views expressed in this statement represent the views of the Commission. My oral statement and responses to questions you may have are my own and do not necessarily reflect those of the Commission or any individual Commissioner.
2. FTC Staff Report, *Possible Anticompetitive Barriers to E-Commerce: Wine* (July 2003), available at <<http://www.ftc.gov/os/2003/07/winereport2.pdf>> (hereinafter "Wine Report").
3. *State Impediments to E-Commerce: Consumer Protection or Veiled Protectionism?: Hearing Before the Subcomm. on Commerce, Trade, and Consumer Protection of the House Comm. on Energy and Commerce, 107th Cong. (2002)*, available at <<http://energycommerce.house.gov/107/hearings/09262002Hearing732/hearing.htm>>.
4. Public Workshop: Possible Anticompetitive Efforts to Restrict Competition on the Internet, 67 Fed. Reg. 48,472 (2002). More information is available at the workshop's homepage, at <<http://www.ftc.gov/opp/ecommerce/anticompetitive/index.htm>>.
5. FTC/DOJ Letter to the Ethics Committee of the North Carolina State Bar re: State Bar Opinions Restricting Involvement of Non-Attorneys in Real Estate Closings and Refinancing Transactions (Dec. 14, 2001), available at <<http://www.ftc.gov/be/v020006.htm>>.
6. FTC/DOJ Letter to the Rhode Island House of Representatives re: Bill Restricting Competition from Non-Attorneys in Real Estate Closing Activities (Mar. 29, 2002), available at <<http://www.ftc.gov/be/v020013.pdf>> FTC/DOJ Letter to the Georgia State Bar re: Comments On Potential Unlicensed Practice Of Law Opinion Regarding Real Estate Closing Activity (Mar. 20, 2003), available at <<http://www.ftc.gov/be/v030007.htm>>.
7. FTC Staff Comment Before the Connecticut Board of Examiners for Opticians (Mar. 27, 2002), available at <<http://www.ftc.gov/be/v020007.htm>>.
8. Memorandum of Law of *Amicus Curiae* Federal Trade Commission, *Powers v. Harris*, Case No. CIV-01-445-F (W.D. Okla. Sept. 5, 2002), available at <<http://www.ftc.gov/os/2002/09/okamicus.pdf>>.
9. *Alix M. Freedman & John R. Emshwiller, Vintage System: Big Liquor Wholesaler Finds Change Stalking Its Very Private World*, *Wall St. J.*, Oct. 4, 1999, at A1. See also Vijay Shanker, Note, *Alcohol Direct Shipment Laws, the Commerce Clause, and the Twenty-First Amendment*, 85 Va. L. Rev. 353, 353 n.5 (Mar. 1999) (discussing other estimates).
10. Mark Swartzberg & Jennifer F. Solomon, *Salomon Smith Barney, Clicking on Wine: Will E-Commerce and Other Forces Increase U.S. Consumer Access to Wine?*, at 18 (Mar. 17, 2000) (equity research report).
11. Wine Report at 16-26.
12. *Id.*
13. One such state is Texas. In a recent case, a federal court in Texas found that Texas law does not promote temperance in banning direct shipment of out-of-state, but not in-state, wines:

The Court finds that there is no temperance goal served by the statute since Texas residents can become as drunk on local wines or on wines of large out-of-state suppliers able to pass into the state through its distribution system, and available in unrestricted quantities, as those that, because of their sellers' size or Texas wholesalers or retailers' constraints, are in practical effect kept out of state by the statute.
14. *Dickerson v. Bailey*, 212 F.Supp.2d 673 (S.D. Tex. 2002), incorporating *Dickerson v. Bailey*, 87 F.Supp.2d 691, 710 (S.D. Tex. 2000), *aff'd*, No. 02-21137, slip op. at 2 (5th Cir. June 26, 2003).
14. Wine Report at 14-16.
15. See Wine Report at 26-40.
16. Illinois letter; Washington letter (Wine Report, App. B).
17. New Hampshire letter (Wine Report, App. B).
18. Wiseman & Ellig (Wine Report, App. A).
19. See California testimony; letters from New Hampshire and Wisconsin (Wine Report, App. B).
20. See Wine Report, notes 47-50 and accompanying text.
21. Testimony of Irene Mead 196, available at <<http://www.ftc.gov/opp/ecommerce/anticompetitive/021008antitrans.pdf>>.
22. New Hampshire letter (Wine Report, App. B).
23. See, e.g., La. Rev. Stat. Ann. § 26:359(B)(1); N.H. Rev. Stat. Ann. § 178:14-a(V); Nev. Rev. Stat. § 369.462.
24. Nebraska letter (Wine Report, App. B).
25. North Dakota letter (Wine Report, App. B).
26. See Letters from Nebraska, New Hampshire, and Wyoming (Wine Report, App. B).

21st Amendment Enforcement Act - Passed October 29, 2000, Effective January 26, 2001

WINE INSTITUTE STATEMENT:

PRESIDENT SIGNS "21st AMENDMENT ENFORCEMENT ACT" (10/29/00)

WASHINGTON, DC - President Clinton signed into law the "Trafficking Victims Protection Act of 2000," which includes Senator Orrin Hatch's (R-Utah) S. 577, the "21st Amendment Enforcement Act," as amended by Senator Dianne Feinstein (D-Calif.).

S. 577 allows state Attorneys General federal court jurisdiction to pursue potential civil injunctive relief for alleged violations of state law regulating the importation or transportation of alcohol. Those news reports that initially claimed that S. 577 will "halt Internet sales of wine" are clearly in error. Quite to the contrary, the legal framework already in place allowing consumers to receive interstate shipments in 20 states and intrastate shipments in 30 states will remain intact. The new law does not provide for either civil damages or criminal penalties and will not adversely affect businesses currently making legal shipments.

With the passage of S. 577, including the Feinstein amendment, Congress and the President for the first time have recognized that the powers vested in the states by the 21st Amendment are not absolute. This mirrors the last 35 years of Supreme Court interpretation of limited state power under the 21st Amendment, requiring the courts to balance state authority under the 21st Amendment with other constitutional rights such as the commerce clause, the due process clause, and the First Amendment. Therefore, in order to gain injunctive relief, a state Attorney General must prove that state law has been violated, and that the law is a valid exercise of power under the 21st Amendment and not inconsistent with any other provision of the Constitution. The President's signature does not grant states any additional power nor endorse any state alcohol laws.

In fact, political closure at the federal level of this highly controversial issue provides an additional incentive for Wine Institute to continue working vigorously at the state level to open the remaining states to allow limited direct shipments of wine to adult citizens. Just as he first stated in May, 1999, at the Wine & Spirits Wholesalers of America (WSWA) annual convention in Boston, Wine Institute President & CEO John De Luca once again makes a direct call to WSWA, "We invite the wholesaler community to work with our organization and consumer groups to craft creative solutions state-by-state as we have since 1985."

S. 577 may well prove beneficial in future litigation, as it is clear that certain state alcohol laws are discriminatory and anti-competitive. These laws protect the wholesalers, and harm consumer choice and hundreds of small wineries that are locked out of the 65-year-old distribution system. State laws that encroach on interstate commerce, or other constitutionally guaranteed rights, are being challenged by wineries and consumers in New York, Texas, Florida, Virginia, Indiana, Michigan and North Carolina.

De Luca praised the many members of Congress, especially Senator Feinstein and House Judiciary Committee Chairman Henry Hyde (R-Ill.), for the legal procedural safeguards included in the final version of S. 577. Their Congressional Record statements are available in the What's New? section: http://www.wineinstitute.org/communications/21amend_enforce_president_signed.htm

Wine Institute Statement "E-Commerce: The Case of Online Wine Sales and Direct Shipment"

October 29, 2003

The Wine Institute submitted a statement to the Congressional Subcommittee on Commerce, Trade and Consumer Protection, which is holding a hearing entitled, "E-Commerce: The Case of Online Wine Sales and Direct Shipment." The hearing will be at 9:30 a.m. est on October 30, 2003 at 2123 Rayburn House Office Building in Washington, D.C. The statement is as follows:

Restrictions on interstate direct-to-consumer wine sales limit competition and place constraints on consumer choice. This issue impacts the ability of consumers to have reasonable access to the wines of their choosing and has been a fundamental concern for Wine Institute's member wineries for decades. Wine Institute is the public policy advocacy group representing more than 660 California wineries and affiliated businesses responsible for more than 80 percent of U.S. wine production and 90 percent of the country's wine exports.

The Wine Institute believes that positive change will continue to be achieved within a regulated marketplace that will accommodate the requirements of state regulators and legislators. Several events, favorable to consumers, have occurred to allow for limited, regulated direct access in a manner that regulators, wineries and consumers all find satisfactory.

The Department of Justice Appropriations Authorization Act allows wine, purchased while visiting a winery, to be shipped to another state.

As a result of heightened airline security and restrictions on passengers to ensure safety, President George W. Bush signed this Act into law on November 4, 2002, which contained a limited direct shipping provision. Consumers, who could otherwise hand carry wine on aircraft into their state in accordance with their state law, can now have it direct shipped to their homes. The Act was a formal endorsement of limited direct shipment by the U.S. Congress.

S.577, the "21st Amendment Enforcement Act," signed into law in October 2000, recognizes that state authority over alcohol distribution laws are not absolute and must be balanced with other constitutional rights.

Congress recognized that the powers vested in the states by the 21st Amendment are not absolute. S.577 requires the courts to balance state authority with other constitutional rights, such as the commerce clause, the due process clause, and the First Amendment. State Attorneys General can now gain access to federal courts to pursue litigation for alleged violations of state law regulating alcohol shipping. However, they must demonstrate that state law is a valid exercise of power under the 21st Amendment and not inconsistent with any other provision of the Constitution.

Certain states maintain preferential treatment of local industry.

Despite U.S. Supreme Court decisions in the past that have ruled preferential taxes and treatments of local wine industries to be unconstitutional, a number of states continue to maintain such practices. As an example, Arkansas allows for local wineries to sell their products in grocery stores, while out-of-state wines are only available in package stores. Missouri and Washington both have imposed taxes on all wines (including out-of-state wines) that are used for the marketing and promotion exclusively of in-state wine industries. Eight states, Indiana, Maine, Michigan, New Jersey, New York, Florida, Rhode Island and Ohio, prohibit interstate direct wine sales, but allow intrastate wine sales and direct shipments.

Texas, Virginia, South Carolina and North Carolina have changed their laws this year to bring total limited direct

shipping states to 26.

As an indication that momentum is on the side of the consumer, court cases, followed by legislative action, have resulted in new state laws allowing limited direct shipping. Several of the courts ruled that bans on interstate shipping were unconstitutional. The District of Columbia and 26 states now allow legal, limited direct shipments. This is the result of ongoing work by the wine industry, and provides various models for how the issue could be resolved in other states. In all cases, the amounts of wine that can be shipped are limited, and provisions exist to prevent delivery to minors.

Opponents of interstate direct shipping do not oppose in-state direct shipping and online sales, making their underage access argument invalid and the laws discriminatory to out-of-state wineries.

Direct shipping opponents have not targeted in-state online wine sales and delivery. The real reason for direct shipping bans is for protection of in-state businesses and the wholesaler system. In fact, opponents, such as the Wine & Spirits Wholesalers of America (WSWA) which claims that direct shipping provisions exacerbate underage access to alcohol, endorsed in 1999 the e-commerce web site, WineShopper.com. This now defunct website attempted to complete the sale transaction through the use of the three-tier distribution. WSWA is not opposed to the fulfillment method as long as the sale is completed through the wholesaler three-tier system.

A July 3, 2003 FTC Report concludes that direct shipping states with delivery safeguards have "few or no problems" with underage access.

The Federal Trade Commission (FTC) issued a July 3, 2003 report, entitled "Possible Anticompetitive Barriers to E-Commerce: Wine." Based on FTC survey responses, the report concludes that the states that allow direct shipping have procedural safeguards against shipments to minors and report "few or no problems" with these shipments.

The FTC report further concludes that many states hold the view that minors are more likely to buy alcohol from local retailers than the Internet because of the high cost of shipping and the fact that minors would have to wait days before learning if a delivery would be made. The FTC "found no evidence suggesting that direct shipping increases underage drinking beyond the levels attributable to sales by brick-and-mortar stores. Unfortunately, the evidence shows that adolescents currently can obtain alcohol without going to the trouble and expense of ordering it over the Internet."

Several reports indicate that most youth obtain alcohol through friends, acquaintances, family members, and other adults who buy or provide alcohol to them. These conclusions are from reports from the Century Council, "Underage Alcohol Access," published May 2003; the NAS "Reducing Underage Drinking" and FTC "Alcohol Marketing and Advertising Report to Congress," both issued September 2003.

Procedural delivery safeguards are in place to prevent underage access.

All states where direct shipping is legal already have regulations that include the three National Academy of Science (NAS) recommendations: calling for alcohol packages to be clearly labeled as such; requiring the alcohol delivery person to verify the recipient's age; requiring that an adult signature be obtained from the recipient of the delivery. Wine Institute has consistently supported the use of these safeguards to help prevent underage access. In addition, common carriers, such as Federal Express and UPS, continuously conduct educational sessions for their delivery staff in those states with legal direct shipments to assure procedural safeguards that will prevent underage deliveries of alcohol packages.

Wineries can service their tasting room customers with direct shipments, especially if they do not have distribution in the customer's state. Most of the 3,000 wineries in the country's 50 states begin their sales and marketing efforts primarily through their on-premise tasting rooms. In California alone, wineries are receiving nearly 11 million visitors annually. While most early visitors usually come from within the state where the winery is located, out-of-state visitors typically come to represent an expanding part of any winery's tasting room sales.

The challenge for wineries is finding a way to allow consumers to buy the wines that they tasted when visiting the winery. In a 2003 survey of Wine Institute members, 54 percent of the wineries indicated that they have been unable to gain access to another state's market due to an inability to find a wholesaler who was willing to carry their brands. This is so because the number of wineries has dramatically grown, while the number of wholesalers has decreased. According to the October

15, 2002 issue of Wine Spectator, there were 2,188 wineries in the United States as of 2000, up from 579 in 1975. The vast majority of those wineries are small, producing multiple labels that the wholesalers are not able to carry. In contrast, WSWA had 450 members in 1975, down to only 170 today."

The wine media provide wide exposure to wine brands, leading consumers to contact wineries for a direct purchase.

Unlike most consumer goods, wine has generated an entire trade and consumer-based media. Wine-oriented consumers have access to a myriad of publications that discuss, critique, review and rate wines on a regular basis. Unlike most industries where product lines remain constant from year-to-year, wine is an agricultural product that can vary with every harvest. Consumers have come to rely upon the wine media to make recommendations and observations about the various wines that are available. Since most wine media is national in scope, it is inevitable that some consumers are going to find themselves searching for wines that are not readily available to them in their local markets. This exposure to new products often leads consumers to contact a winery directly to make a purchase.

Wine Institute supports the three-tier system, but advocates for augmenting distribution.

A number of state laws and regulations have developed since the repeal of Prohibition that serve to limit consumer choice. Wine Institute has worked carefully with its member wineries to develop solutions to this consumer problem which do not undermine the ongoing role of state regulators and local wholesalers and retailers. It has been Wine Institute's position that "we need to augment the three-tier system, not replace it."

Conclusions

Wine Institute believes that the right path for the future is working with states to craft legislation that is a compromise between consumer demand for choices and the regulatory requirements that create a safe and orderly market. Eighteen years ago no state had passed direct shipment legislation. Today, more than half of the states have some type of curative legislation on the books. Additional states will open up their markets for direct wine shipping. It is the consumer who will benefit. Wine Institute applauds the Congress for taking an interest in this consumer-driven issue.

Credentialed journalists and Wine Institute members requiring further information may contact the Wine Institute [Communications Department](mailto:Communications@wineinstitute.org)

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Alaska

Summary



Alaska does not limit or tax wine shipments into the state. It does, however, permit its communities to restrict sales/shipments of alcohol by way of local election. It is illegal to ship to those communities. Click the link under 'relevant documents' for a list of those communities which do not allow alcohol shipments (the list is maintained by Alaska's Alcoholic Beverage Control Board). Call the ABC at (907) 269-0350 if you have further questions. FedEx has approved shipments only to certain zip codes. Click the link under 'relevant documents' to see that list. Alaska's FedEx list is not just "wet" - it is "serviced by" as well. The listing of zip codes are those that are approved for wine shipping under the FedEx program. Other zips (while they may be wet) go to regions where they use contractors rather than FedEx employees (and they don't allow contractors to handle hazardous, highly insured, or "special handling" shipments), or where they felt that the product was likely to be held outside for extended periods of time in inclement weather, and therefore they won't carry.

Contact Info

**Department of Public Safety
Alcoholic Beverage Control Board**
5848 E. Tudor Road
Suite #350
Anchorage, AK 99507
Phone: 907 269 0350
Fax: 907 272 9412

Offsite Rules

Limited

General Rule Description:

Winery must ensure that shipping label contains required language set forth by state or region it is shipped to.

Special Shipping Label Required

Shipments to this region for both onsite and offsite sales require the following information to appear on the shipping label: 'Alcoholic Beverages'.

Onsite Rules

Allowed

Relevant Documents

- FedEx Approved Zip Codes for Shipping to Alaska
- Alaska Statutes
- Local Option Communities

Special Shipping Label Required

**FedEx Approved Zip Codes for A
Wine Shipping Program
November 1, 2006**

Anchorage	Fairbanks	Juneau	Sitka
99501	99701	99801	99835
99502	99702	99824	99836
99503	99705		
99504	99709		
99505	99712		
99506	99714		
99507	99790		
99508			
99513			
99515			
99516			
99517			
99518			
99540			
99567			
99577			
99599			
99654			
99676			
99529			
99530			

Due to low seasonal temperatures please check the local weather conditions before shipping.

HB

65

SENATE COMMITTEE REPORT

DATE: 2/29/08

FURTHER: Judiciary
Finance

DATE TURNED
IN TO OFFICE: 3/19/08

Labor and Commerce Committee considered CS FOR HOUSE BILL NO. 65(FIN)

HB 65 PERSONAL INFORMATION & CONSUMER CREDIT

"An Act relating to breaches of security involving personal information, credit report and credit score security freezes, protection of social security numbers, care of records, disposal of records, identity theft, credit cards, and debit cards, and to the jurisdiction of the office of administrative hearings; amending Rules 60 and 82, Alaska Rules of Civil Procedure; and providing for an effective date."

and recommends:

- be replaced with SCS or CS CS HB 65 (LTC)
- adopt previous SCS or CS _____
- attached amendment(s)
- adopt _____ Letter of Intent
- further referral to _____ Committee

SENATE BILL:	
<input type="checkbox"/> Same Title	
<input type="checkbox"/> New Title	
<hr/>	
HOUSE BILL:	
<input checked="" type="checkbox"/> Same Title	
<input type="checkbox"/> Technical Title Change	
<input type="checkbox"/> New Title w/ SCR # _____	

NEW FISCAL NOTE(S):

Department	Date	Fiscal Impact	Zero	Other
ADM	2/14/08	✓		

PREVIOUS FISCAL NOTE(S):

Department	Date	Fiscal Impact	Zero	Other	#
GOV/OMB	2/20/08		✓		3

APPROPRIATION - no fiscal note

Committee	Member	Present	Other	Other	Other
	CSunde	✓			
	Bonnie Davis	✓			
	 	 			
CHAIR:	J. Ellis	✓			

LEGAL SERVICES

DIVISION OF LEGAL AND RESEARCH SERVICES
LEGISLATIVE AFFAIRS AGENCY
STATE OF ALASKA

(907) 465-3867 or 465-2450
FAX (907) 465-2029
Mail Stop 3101


State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 18, 2008

SUBJECT: Notice amendment to SCS CSHB 65(), Draft Version "N," relating to personal information (Work Order No. 25-LS0311(N.1))

TO: Senator Johnny Ellis
Chair of the Senate Labor and Commerce Committee
Attn: Dana Owen

FROM:  Theresa Bannister
Legislative Counsel

This memo accompanies the amendment described above.

Please be aware that, in order to provide you with this amendment by committee time, I have not had time to review the relationship of the federal E-SIGN act (15 U.S.C. 7001 - 7031) with sec. 45.48.030(2).

If I may be of further assistance, please advise.

TLB:med
08-197.med

Enclosure

ALASKA STATE HOUSE OF REPRESENTATIVES

Contact:

Interim Address:

**3340 Badger Road
North Pole, AK 99705
(907)-488-5725
Fax# (907)-488-4271**

**Session**

**(907)-465-3719
FAX# (907)-465-3258
State Capitol
Room 204**

REPRESENTATIVE JOHN COGHILL

SPONSOR STATEMENT CSHB 65 (FIN) (25-LS03110)

"An Act relating to the breaches of security involving personal information, credit report and credit score security freezes, protection of social security numbers, care of records, disposal of records, identify theft, credit cards, and debit cards, and to the jurisdiction of the office of administrative hearings; amending Rules 60, and 82 Alaska Rules of Civil Procedure; and providing for an effective date."

In a time when information of every personal type is transmitted and stored electronically, it is necessary that those that have access to the use, storage, and disposal of sensitive consumer information be accountable and responsible.

This legislation deals with specific areas designed to secure a consumer's private information and ensure affordable access to their credit information.

This bill has 7 articles that deal with all areas of personal information and the rights and protections the consumer has and can expect from individuals that handle their personal information. The 7 articles are:

- (1) Breach of Security Involving Personal Information** - requires disclosure of breaches of security involving personal information.
- (2) Credit Report and Credit Score Security Freeze** - allows consumer to freeze and unfreeze access to their credit information at their discretion.
- (3) Protection of Social Security Number** - by restricting sale and distribution.
- (4) Disposal of Records** - requires complete destruction of electronic and paper records that contain personal information.
- (5) Factual Declaration of Innocence after Identity Theft; Right to File Police Report Regarding Identity Theft** - allows a person that is a victim of identify theft to make a factual declaration of innocence.
- (6) Truncation of Card Information** - setting up guidelines for use of card numbers on receipts.
- (7) General Provisions** - provides definitions for terms within the chapter, cites the short title of this bill as the *Alaska Personal Information Protection Act*, and establishes effective dates.

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Juneau, Alaska 99801-1182
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MEMORANDUM

March 18, 2008

SUBJECT: Notice amendment to SCS CSHB 65(), Draft Version "N," relating to personal information (Work Order No. 25-LS0311\N.1)

TO: Senator Johnny Ellis
Chair of the Senate Labor and Commerce Committee
Attn: Dana Owen

FROM: *JB*
Theresa Bannister
Legislative Counsel

This memo accompanies the amendment described above.

Please be aware that, in order to provide you with this amendment by committee time, I have not had time to review the relationship of the federal E-SIGN act (15 U.S.C. 7001 - 7031) with sec. 45.48.030(2).

If I may be of further assistance, please advise.

TLB:med
08-197.med

Enclosure

AMENDMENT

#1
adopted

OFFERED IN THE SENATE

TO: SCS CSHB 65(), Draft Version "N"

- 1 Page 3, line 4, following "if":
- 2 Insert "the information collector's primary method of communication with the state
- 3 resident is by electronic means, or if"

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Mail Stop 3101

State Capitol
Juneau, Alaska 99801-1182
Deliveries to: 129 6th St., Rm. 329

MEMORANDUM

March 19, 2008

SUBJECT: SCS CSHB 65(L&C) relating to personal information
(Work Order No. 25-LS0311\T)

TO: Senator Johnny Ellis
Chair of the Senate Labor and Commerce Committee
Attn: Dana Owen

FROM: *TB*
Theresa Bannister
Legislative Counsel

This memo accompanies a final of the bill described above.

1. Federal preemption. As you are probably aware, because the bill deals with an area that is heavily, and, in some areas exclusively, regulated by the Federal Credit Reporting Act¹ (FCRA), there is an issue whether the FCRA preempts any of the new provisions. Please be aware that while it appears that most of the general areas in the bill have not been directly regulated by FCRA, the FCRA's provisions regarding what it preempts are not clear at all.
2. Interstate commerce. Because this bill could apply to out-of-state businesses that operate in the state it raises a constitutional interstate commerce issue. Whenever a bill establishes a requirement that may affect persons operating from another state, there is always a question whether the requirement places a burden on interstate commerce that would not satisfy the federal constitutional commerce clause.

If I may be of further assistance, please advise.

TLB.lmb
08-065.lmb

Enclosure

¹ 15 U.S.C. 1681 et seq.

25-LS0311\V

Bannister

3/12/08

SENATE CS FOR CS FOR HOUSE BILL NO. 65()
IN THE LEGISLATURE OF THE STATE OF ALASKA
TWENTY-FIFTH LEGISLATURE - SECOND SESSION

BY

Offered:

Referred:

Sponsor(s): REPRESENTATIVES COGHILL AND GARA, Hawker, Lynn, Samuels, Fairclough, Ramras, Kawasaki, Kerttula, Gatto, Neuman, Olson, Dahlstrom, Gardner, Johnson, Wilson, Guttenberg, Holmes, Nelson, Crawford, LeDoux, Keller, Deogan, Buch, Roses, Cissna

SENATORS Therriault, Wilken

A BILL

FOR AN ACT ENTITLED

1 **"An Act relating to breaches of security involving personal information, credit report**
2 **and credit score security freezes, protection of social security numbers, care of records,**
3 **disposal of records, identity theft, credit cards, and debit cards, and to the jurisdiction of**
4 **the office of administrative hearings; amending Rules 60 and 82, Alaska Rules of Civil**
5 **Procedure; and providing for an effective date."**

6 **BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:**

7 *** Section 1. AS 40.21.110 is amended to read:**

8 **Sec. 40.21.110. Care of records. Except for public records lawfully in the**
9 **possession of a person other than the state, public records of existing or defunct**
10 **agencies of the state, territorial, and Russian governments in Alaska are the property**
11 **of the state and shall be created, maintained, preserved, stored, transferred, destroyed**
12 **or disposed of, and otherwise managed in accordance with the provisions of this**
13 **chapter and AS 45.48.500 - 45.48.530. Records shall be delivered by outgoing**

1 officials and employees to their successors, and may not be removed, destroyed or
2 disposed of, except as provided in this chapter and AS 45.48.500 - 45.48.530.

3 * Sec. 2. AS 44.64.030(a) is amended by adding a new paragraph to read:

4 (40) AS 45.48.080(c) (breach of security involving personal
5 information).

6 * Sec. 3. AS 45 is amended by adding a new chapter to read:

7 **Chapter 48. Personal Information Protection Act.**

8 **Article 1. Breach of Security Involving Personal Information.**

9 **Sec. 45.48.010. Disclosure of breach of security.** (a) If a covered person owns
10 or licenses personal information in any form that includes personal information on a
11 state resident, and a breach of the security of the information system that contains
12 personal information occurs, the covered person shall, after discovering or being
13 notified of the breach, disclose the breach to each state resident whose personal
14 information was subject to the breach.

15 (b) An information collector shall make the disclosure required by (a) of this
16 section in the most expeditious time possible and without unreasonable delay, except
17 as provided in AS 45.48.020 and as necessary to determine the scope of the breach and
18 restore the reasonable integrity of the information system.

19 (c) Notwithstanding (a) of this section, disclosure is not required if, after an
20 appropriate investigation or after consultation with relevant federal, state, or local
21 agencies responsible for law enforcement, the covered person determines that there is
22 not a reasonable likelihood that harm to the consumers whose personal information
23 has been acquired has resulted or will result from the breach. The determination shall
24 be documented in writing and the documentation shall be maintained for five years.

25 **Sec. 45.48.020. Allowable delay in notification.** An information collector
26 may delay disclosing the breach under AS 45.48.010 if an appropriate law
27 enforcement agency determines that disclosing the breach will interfere with a
28 criminal investigation. However, the information collector shall disclose the breach to
29 the state resident in the most expeditious time possible and without unreasonable delay
30 after the law enforcement agency informs the information collector in writing that
31 disclosure of the breach will no longer interfere with the investigation.

1 **Sec. 45.48.030. Methods of notice.** An information collector shall make the
2 disclosure required by AS 45.48.010

3 (1) by a written document sent to the most recent address the
4 information collector has for the state resident;

5 (2) by electronic means if making the disclosure by the electronic
6 means is consistent with the provisions regarding electronic records and signatures
7 required for notices legally required to be in writing under 15 U.S.C. 7001 et seq.
8 (Electronic Signatures in Global and National Commerce Act); or

9 (3) if the information collector demonstrates that the cost of providing
10 notice would exceed \$150,000, that the affected class of state residents to be notified
11 exceeds 300,000, or that the information collector does not have sufficient contact
12 information to provide notice, by

13 (A) electronic mail if the information collector has an
14 electronic mail address for the state resident;

15 (B) conspicuously posting the disclosure on the Internet
16 website of the information collector if the information collector maintains an
17 Internet site; and

18 (C) providing a notice to major statewide media.

19 **Sec. 45.48.040. Notification of certain other agencies.** (a) If an information
20 collector is required by AS 45.48.010 to notify more than 1,000 state residents of a
21 breach, the information collector shall also notify without unreasonable delay all
22 consumer credit reporting agencies that compile and maintain files on consumers on a
23 nationwide basis and provide the agencies with the timing, distribution, and content of
24 the notices.

25 (b) This section may not be construed to require the information collector to
26 provide the consumer reporting agencies identified under (a) of this section with the
27 names or other personal information of the state residents whose personal information
28 was subject to the breach.

29 (c) This section does not apply to an information collector who is subject to 15
30 U.S.C. 6801 - 6827 (Gramm-Leach-Bliley Financial Modernization Act).

31 (d) In this section, "consumer reporting agency that compiles and maintains

1 files on consumers on a nationwide basis" has the meaning given in 15 U.S.C.
2 1681a(p).

3 **Sec. 45.48.050. Exception for employees and agents.** In AS 45.48.010 -
4 45.48.090, the good faith acquisition of personal information by an employee or agent
5 of an information collector for a legitimate purpose of the information collector is not
6 a breach of the security of the information system if the employee or agent does not
7 use the personal information for a purpose unrelated to a legitimate purpose of the
8 information collector and does not make further unauthorized disclosure of the
9 personal information.

10 **Sec. 45.48.060. Waivers.** A waiver of AS 45.48.010 - 45.48.090 is void and
11 unenforceable.

12 **Sec. 45.48.070. Treatment of certain breaches.** (a) If a breach of the security
13 of the information system containing personal information on a state resident that is
14 maintained by an information recipient occurs, the information recipient is not
15 required to comply with AS 45.48.010 - 45.48.030. However, immediately after the
16 information recipient discovers the breach, the information recipient shall notify the
17 information distributor who owns the personal information or who licensed the use of
18 the personal information to the information recipient about the breach and cooperate
19 with the information distributor as necessary to allow the information distributor to
20 comply with (b) of this section. In this subsection, "cooperate" means sharing with the
21 information distributor information relevant to the breach, except for confidential
22 business information or trade secrets.

23 (b) If an information recipient notifies an information distributor of a breach
24 under (a) of this section, the information distributor shall comply with AS 45.48.010 -
25 45.48.030 as if the breach occurred to the information system maintained by the
26 information distributor.

27 **Sec. 45.48.080. Violations.** (a) If an information collector who is a
28 governmental agency violates AS 45.48.010 - 45.48.090 with regard to the personal
29 information of a state resident, the information collector

30 (1) is liable to the state for a civil penalty of up to \$500 for each state
31 resident who was not notified under AS 45.48.010 - 45.48.090, but the total civil